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Chapter IX

Protection of the environment in relation to armed conflicts

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C. Text of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission

2. Text of the draft principles and commentaries thereto provisionally adopted by the Commission at its seventieth session

The text of the draft principles and commentaries thereto provisionally adopted by the Commission at its seventieth session is reproduced below.

Protection of the environment in relation to armed conflicts

Draft principle 4

Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.
2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

Commentary

(1) The purpose of draft principle 4 is to ensure that States take effective measures to enhance the protection of the environment in relation to armed conflict. Paragraph 1 recalls obligations under international law and paragraph 2 encourages States voluntarily to take further measures to this end. The phrase "to enhance the protection of the environment", included in both paragraphs, corresponds to the purpose of the set of draft principles. Similarly, the phrase "in relation to armed conflict", also inserted in both paragraphs, is intended to underline the connection of environmental protection to armed conflict.

(2) Paragraph 1 reflects that States have obligations under international law to enhance the protection of the environment in relation to armed conflict and addresses the measures that States are obliged to take to this end. The obligation is denoted by the word "shall". The requirement is qualified by the expression "pursuant to their obligations under international law", indicating that the provision does not require States to take measures that go beyond their existing obligations. The specific obligations of a State under this provision will differ according to which relevant obligations under international law it is bound.

(3) Consequently, paragraph 1 is formulated broadly in order to cover a wide range of measures. The provision includes examples of the types of measures that can be taken by States, namely, "legislative, administrative, judicial and other measures". The examples are not exhaustive, as indicated by the open category "other measures". Instead, the examples aim to highlight the most relevant types of measures to be taken by States.

(4) The law of armed conflict imposes several obligations on States that directly or indirectly contribute to the aim of enhancing the protection of the environment in relation to armed conflict. The notion "under international law" is nevertheless broader and covers also other relevant treaty-based or customary obligations related to the protection of the environment before, during or after an armed conflict, whether derived from international environmental law, human rights law or other areas of law.

(5) As far as the law of armed conflict is concerned, the obligation to disseminate the law of armed conflict to armed forces and, to the extent possible, also to the civilian population contributes to the protection of the environment.¹ A relevant provision to this

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85, art. 48; Geneva Convention relative to the Treatment of Prisoners of War (Convention III)

end is article 83 of Additional Protocol I, which provides that the High Contracting Parties are under the obligation to disseminate information on, among other provisions, articles 35 and 55² to their forces. This obligation can also be linked to common article 1 of the Geneva Conventions, in which States Parties undertake to respect and ensure respect for the Conventions in all circumstances.³ Such dissemination can take place for instance through the inclusion of relevant information in military manuals,⁴ as encouraged by the International Committee of the Red Cross (ICRC) Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict.⁵

(6) Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of international humanitarian law by parties to an armed conflict.⁶ As far as the protection of the environment is concerned, this could entail, for instance, sharing of scientific expertise as to the nature of the damage caused to the natural environment by certain types of weapons, or making available technical advice as to how to protect areas of particular ecological importance or fragility.

(7) A further obligation to conduct "a weapons review" is found in article 36 of Additional Protocol I. According to this provision, a High Contracting Party is under an obligation to determine whether the employment of a new weapon would, in some or all

(Geneva, 12 August 1949), *ibid.*, No. 972, p. 135, art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287, art. 144; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17512, p. 3, art. 83; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) (Geneva, 8 June 1977), *ibid.*, No. 17513, p. 609, art. 19; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Additional Protocol III) (Geneva, 8 December 2005), *ibid.*, vol. 2404, No. 43425, p. 261, art. 7; and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Geneva, 10 October 1980), *ibid.*, vol. 1342, No. 22495, p. 137, art. 6. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Rules*, vol. I (Cambridge, Cambridge University Press, 2005), rule 143, pp. 505–508.

² Art. 35 of Additional Protocol I reads:

- "1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

Art. 55 reads:

- "1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited."

³ Geneva Convention I, art. 1; Geneva Convention II, art. 1; Geneva Convention III, art. 1; Geneva Convention IV, art. 1.

⁴ Examples of States that have introduced such provisions in their military manuals include Argentina, Australia, Belgium, Benin, Burundi, Canada, Central African Republic, Chad, Colombia, Côte d'Ivoire, France, Germany, Italy, Kenya, Netherlands, New Zealand, Peru, the Russian Federation, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45 (accessed on 7 May 2018).

⁵ The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict (A/49/323, annex) states, in guideline 17, that: "States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programmes of military and civil instruction".

⁶ See the 2016 ICRC commentary (2016) on article 1 of Geneva Convention I, paras. 164–173.

circumstances, be prohibited by Additional Protocol I or by any other applicable rule of international law.⁷ It is notable that the obligation covers the study, development, acquisition or adoption of all means or methods of warfare: both weapons and the way in which they can be used.⁸ According to the ICRC commentary on the Additional Protocols, article 36 “implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality”. A number of States, including States not party to Additional Protocol I, are known to have established such procedures.⁹

(8) The obligation to institute “a weapons review” binds all High Contracting Parties to Additional Protocol I. The reference to “any other rule of international law” makes it clear that the obligation goes beyond merely studying whether the employment of a certain weapon would be contrary to the law of armed conflict. This means, first, an examination of whether the employment of a new weapon, means or method of warfare would, in some or all circumstances, be prohibited by Additional Protocol I, including articles 35 and 55, which are of direct relevance to the protection of the environment. Second, there is a need to go beyond Additional Protocol I and analyse whether any other rules of the law of armed conflict, treaty or customary, or any other areas of international law might prohibit the employment of a new weapon, means or method of warfare. Such examination will include taking into account any applicable international environmental law and human rights obligations.¹⁰

(9) While Additional Protocol I applies only to international armed conflict, the weapons review provided for in article 36 also promotes the respect for the law in non-international armed conflicts. Furthermore, the use of weapons that are inherently indiscriminate and the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering are prohibited under customary international law.¹¹ These rules are not limited to international armed conflict.¹² It follows that new weapons as well as methods of warfare are to be reviewed against all applicable international law, including the law governing non-international armed conflicts, in particular as far as the protection of civilians and the principle of distinction are concerned. The obligation not to use inherently indiscriminate weapons, means or methods of warfare has the indirect effect of protecting the environment in a non-international armed conflict. Furthermore, the special treaty-based prohibitions of certain weapons (such as biological and chemical weapons) that may cause serious environmental harm must be observed.

⁷ Additional Protocol I, art. 36.

⁸ C. Pilloud and J. Pictet, “Article 35: Basic rules”, *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski and B. Zimmerman (eds.) (Geneva, Martinus Nijhoff, 1987), p. 398, para. 1402. The commentary on “Article 36: New weapons” refers to this section for an explanation of means and methods on p. 425, para. 1472.

⁹ States that are known to have in place national mechanisms to review the legality of weapons and that have made the instruments setting up these mechanisms available to ICRC include Australia, Belgium, Canada, Denmark, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. Other States have indicated to ICRC that they carry out reviews pursuant to Ministry of Defence instructions, but these have not been made available. Information received from ICRC on 31 December 2017.

¹⁰ Some States, such as Sweden, Switzerland and the United Kingdom, see a value in considering international human rights law in the review of military weapons because military personnel may in some situations (e.g. peacekeeping missions) use the weapon to conduct law enforcement missions. For further commentary, see S. Casey-Maslen, N. Corney and A. Dymond-Bass, “The review of weapons under international humanitarian law and human rights law”, *Weapons under International Human Rights Law*, Casey-Maslen (ed.) (Cambridge University Press, Cambridge, 2014).

¹¹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, rules 70 and 71, pp. 237–250.

¹² By virtue of the customary rule that civilians must not be made the object of attack, weapons that are by nature indiscriminate are also prohibited in non-international armed conflicts. The prohibition of weapons that are by nature indiscriminate is also set forth in several military manuals applicable in non-international armed conflicts, for instance those of Australia, Colombia, Ecuador, Germany, Nigeria and the Republic of Korea. Information available at https://ihl-databases.icrc.org/customary-ihl/cng/docs/v1_rul_rule71#Fn_1_19 (accessed on 8 May 2018).

(10) States also have the obligation to effectively exercise jurisdiction and prosecute those suspected of certain war crimes that have a bearing on the protection of the environment in relation to armed conflict, to the extent that such crimes fall within the category of grave breaches of the Geneva Conventions.¹³ Examples of grave breaches, the suppression of which provides indirect protection to certain components of the natural environment, include wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly and unlawfully.

(11) Yet another treaty-based obligation is for States to record the laying of mines in order to facilitate future clearing of landmines and explosive remnants of war.¹⁴

(12) Paragraph 2 of the draft principle addresses voluntary measures that would further enhance the protection of the environment in relation to armed conflict. This paragraph is therefore less prescriptive than paragraph 1 and the word "should" is used to reflect this difference. The phrases "[i]n addition" and "further measures" both serve to indicate that this provision goes beyond the measures that States shall take pursuant to their obligations under international law, which are addressed in paragraph 1. Like the measures referred to in paragraph 1, the measures taken by States may be of legislative, judicial, administrative or other nature. Furthermore, they could include special agreements providing additional protection to the natural environment in situations of armed conflict.¹⁵

(13) In addition to encouraging States to take voluntary measures to enhance the protection of the environment in relation to armed conflict beyond their current obligations under international law, the paragraph captures the recent developments in the practice of States to this end.¹⁶ One example of how States can continue this development is through providing more explicit guidelines on environmental protection in their military manuals.¹⁷ Such guidelines may, for instance, aim to ensure training of military personnel involved in peace operations on the environmental aspects of the operation, as well as the conduct of environmental assessments.¹⁸ Other measures that should be taken by States can aim at enhancing cooperation, as appropriate, with other States, as well as with relevant international organizations.

(14) The overall development that paragraph 2 aims to capture and encourage has its basis also in the practice of international organizations. One example of such practice is the United Nations initiative "Greening the Blue Helmets", which aims to function as an

¹³ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

¹⁴ See, for example, the amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 3 May 1996) (hereinafter, "amended Protocol II to the Convention on Certain Conventional Weapons"), United Nations, *Treaty Series*, vol. 2048, No. 22495, p. 93.

¹⁵ For special agreements, see Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7. See also common art. 3 of the Geneva Conventions.

¹⁶ See, e.g., Slovenia, Rules of Service in the Slovenian Armed Forces, item 210; Paraguay, National Defence Council, *Política de Defensa Nacional de la Republica de Paraguay* [National Defence Policy of the Republic of Paraguay], 7 October 1999, para. 1 (A); and Netherlands, note verbale dated 20 April 2016 from the Permanent Mission of the Netherlands to the United Nations addressed to the Secretariat, para. 5. See also contributions in the Sixth Committee from Croatia (A/C.6/70/SR.24, para. 89), Cuba (*ibid.*, para. 10), the Czech Republic (A/C.6/70/SR.24, para. 45), New Zealand (A/C.6/70/SR.25, para. 102) and Palau (*ibid.*, para. 27).

¹⁷ Examples of States that have done so include Australia, Burundi, Cameroon, Côte d'Ivoire, Netherlands, Republic of Korea, Ukraine, the United Kingdom and the United States. Information available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule44 (accessed on 8 May 2018). For further examples, see A/CN.4/685, paras. 69–76 and A/CN.4/700, para. 52.

¹⁸ See the information on the United Nations Environment Programme (UNEP) website regarding post-crisis environmental recovery, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/recovery.

environmental, sustainable management programme.¹⁹ A further example of this development is the joint environmental policy developed by the United Nations Department of Peacekeeping Operations and Department of Field Services. The policy includes obligations to develop environmental baseline studies and adhere to a number of multilateral environmental agreements. References are made to treaties and instruments, including the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),²⁰ the World Charter for Nature,²¹ the Convention on International Trade in Endangered Species of Wild Fauna and Flora,²² the Convention on Biological Diversity²³ and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention),²⁴ as standards to be considered when a mission establishes its environmental objectives and procedures.²⁵

Draft principle 6

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.
2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Commentary

(1) Draft principle 6 recognizes that States should, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect such an environment in relation to an armed conflict. It further recognizes that where armed conflict has adversely affected the environment of indigenous peoples' territories, States should attempt to undertake remedial measures. In light of the special relationship between indigenous peoples and their environment, these steps should be taken in a manner that consults and cooperates with such peoples, respecting their relationship and through their own leadership and representative structures.

(2) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples,²⁶ as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end,

¹⁹ UNEP, *Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations* (Nairobi, 2012).

²⁰ Report of the United Nations Conference on the Human Environment (A/CONF.48/14/Rev.1; United Nations publication, Sales No. E.73.II.A.14), chap. I.

²¹ General Assembly resolution 37/7 of 28 October 1982, annex.

²² Opened for signature, Washington, 3 March 1975, United Nations, *Treaty Series*, vol. 993, No. 14537, p. 243.

²³ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.

²⁴ Ramsar, 2 February 1971, United Nations, *Treaty Series*, vol. 994, No. 14583, p. 245.

²⁵ United Nations, Department of Peacekeeping Operations and the Department of Field Support, "Environmental Guidelines for UN Field Missions", 24 July 2009. See also the Department of Field Support website, available at <https://fieldsupport.un.org/en/environment>.

²⁶ See International Labour (ILO), Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), which revised the Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex, article 26. The reports of the Special Rapporteur on the rights of indigenous peoples, and the Special Rapporteur on human rights and the environment (formerly the Independent Expert on human rights and the environment) provide an overview of the rights of indigenous peoples in connection to the environment and natural resources.

the land of indigenous peoples has been recognized as having a "fundamental importance for their collective physical and cultural survival as peoples".²⁷

(3) Paragraph 1 is based, in particular, on article 29, paragraph 1, of United Nations Declaration on the Rights of Indigenous Peoples, which expresses the right of indigenous peoples to "the conservation and protection of the environment and the productive capacity of their lands or territories and resources",²⁸ and article 7, paragraph 4, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which recognizes that "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".

(4) The specific rights of indigenous peoples over certain lands or territories may be the subject of different legal regimes in different States. Further, in international instruments concerning the rights of indigenous peoples, various formulations are used to refer to the lands or territories connected to indigenous peoples, and over which they have various rights and protective status.²⁹

(5) Armed conflict may have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on the territories concerned and thereby affecting the survival and well-being of the peoples connected to it. Under paragraph 1, in the event of an armed conflict, States should take appropriate measures to promote the continuation of the relationship that indigenous peoples have with their ancestral lands. The appropriate protective measures referred to in paragraph 1 may be taken, in particular, before or during an armed conflict. The wording of the paragraph is broad enough to allow for the measures to be adjusted according to the circumstances.

(6) For example, the concerned State should take steps to ensure that military activities do not take place in the lands or territories of indigenous peoples unless justified by a relevant public interest. This could be achieved through avoiding placing military installations in indigenous peoples' lands or territories, and by designating their territories as protected areas, as set out in draft principle 5. In general, the concerned State should consult effectively with the indigenous peoples concerned prior to using their lands or territories for military activities.³⁰ During an armed conflict, the rights, lands and territories

²⁷ See, for example, *Rio Negro Massacres v. Guatemala*, in which the Inter-American Court of Human Rights recognized "the culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity". *Rio Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Series C, Case No. 250, 4 September 2012, para. 177, footnote 266. C.f. *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Series C, Case No. 125, 17 June 2005, para. 135, and *Case of Chitay Nech et al. v. Guatemala*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, Case No. 212, 25 May 2010, para. 147, footnote 160.

²⁸ See also American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, Organization of American States, General Assembly, *Report of the Forty-Sixth Regular Session, Santo Domingo, Dominican Republic, June 13-15, 2016*, XLVI-O.2, *Proceedings*, vol. I, resolution AG/RES. 2888 (XLVI-O/16), art. XIX, para. 4.

²⁹ See, for example, "lands or territories, or both as applicable, which they occupy or otherwise use" used in art. 13, 1, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), or "lands, territories and resources" used in the preamble of United Nations Declaration on the Rights of Indigenous Peoples.

³⁰ See United Nations Declaration on the Rights of Indigenous Peoples, art. 30:

"1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities."

of indigenous peoples also enjoy the protections provided by the law of armed conflict and applicable human rights law.³¹

(7) Paragraph 2 focuses on the phase after an armed conflict has ended. The purpose of this provision is to facilitate the taking of remedial measures in the event that an armed conflict has adversely affected the environment of the territories that indigenous peoples inhabit.³² In doing so, it seeks to ensure the participatory rights of indigenous peoples in issues relating to their territories in a post-conflict context, while focusing on States as the subjects of the paragraph.

(8) In such instance, the concerned States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. In doing so, States should consider the special nature of the relationship between indigenous peoples and their territories — in its social, political, spiritual, cultural and other aspects. Further, States should consider that this relationship is often of a “collective” nature.³³

(9) The need to proceed through appropriate procedures and representative institutions of indigenous peoples has been included to acknowledge the diversity of the existing procedures within different States that allow for effective consultation and cooperation with indigenous peoples, and the diversity of their modes of representation in order to obtain their free, prior and informed consent before adopting measures that may affect them.³⁴

Draft principle 7

Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of

³¹ See the American Declaration on the Rights of Indigenous Peoples, art. XXX, paras. 3 and 4, which read:

“3. Indigenous peoples have the right to protection and security in situations or periods of internal or international armed conflict, in accordance with international humanitarian law.

4. States, in compliance with international agreements to which they are party, in particular those of international humanitarian law and international human rights law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Protocol II thereof relating to the protection of victims of non-international armed conflicts, shall, in the event of armed conflicts, take adequate measures to protect the human rights, institutions, lands, territories, and resources of indigenous peoples and their communities [...]”.

³² According to the United Nations Declaration on the Rights of Indigenous Peoples, art. 28, “[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”. Similarly, the American Declaration on the Rights of Indigenous Peoples, art. XXXIII, states: “Indigenous peoples and individuals have the right to effective and suitable remedies, including prompt judicial remedies, for the reparation of any violation of their collective and individual rights. States, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.”

³³ For example, see art. 13 of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which states that “In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”. Though specific to that Convention’s application, it explicitly notes the collective aspects of the relationship that indigenous peoples have with their lands or territories.

³⁴ See for instance, United Nations Declaration on the Rights of Indigenous Peoples, art. 19. The Inter-American Court of Human Rights has established safeguards requiring States to obtain the “free, prior, and informed consent [of indigenous peoples], according to their customs and traditions”. See *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007, para. 134.

military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Commentary

(1) Draft principle 7 addresses agreements concluded by States among themselves and between States and international organizations, concerning the presence of military forces in relation to armed conflict. The phrase "in relation to armed conflict" underlines the purpose of the draft principles: to enhance the protection of the environment in relation to armed conflict. Consequently, the provision does not refer to situations in which military forces are being deployed without any relation to an armed conflict, since such situations are outside the scope of the topic.

(2) The draft principle is cast in general terms to refer to "agreements concerning the presence of military forces in relation to armed conflict". The specific designation and purpose of such agreements can vary, and may, depending on the particular circumstances, include status of forces and status of mission agreements. The purpose of the draft principle is to reflect recent developments whereby States and international organizations have begun addressing matters relating to environmental protection in agreements concerning the presence of military forces concluded with host States.³⁵ The word "should" indicates that this provision is not mandatory in nature, but rather aims at acknowledging and encouraging this development.

(3) Examples of environmental provisions in agreements concerning the presence of military forces in relation to armed conflict include the United States-Iraq agreement on the withdrawal of the United States from Iraq, which contains an explicit provision on the protection of the environment.³⁶ Another example is the status of forces agreement between the North Atlantic Treaty Organization (NATO) and Afghanistan, in which the parties agree to pursue a preventative approach to environmental protection.³⁷ The status of mission agreement under the European Security and Defence Policy also makes several references to environmental obligations.³⁸ Relevant treaty practice includes also the agreement between Germany and other NATO States, which states that potential environmental effects shall be identified, analysed and evaluated, in order to avoid environmental burden.³⁹

³⁵ The Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia (*Official Journal* L 082, 29/03/2003 P. 0046 – 0051, annex; hereinafter, "Concordia status of forces agreement"), art. 9, provided a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources. See Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329(01)) (accessed on 7 May, 2018).

³⁶ Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq (Baghdad, 17 November 2008), art. 8 (hereinafter, "United States-Iraq Agreement"). Available at www.state.gov/documents/organization/122074.pdf.

³⁷ Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan (Kabul, 30 September 2014), *International Legal Materials*, vol. 54, pp. 272–305, art. 5, para. 6, art. 6, para. 1, and art. 7, para. 2.

³⁸ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (Brussels, 17 November 2003). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42003A1231%2801%29> (accessed on 7 May, 2018).

³⁹ Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Bonn, 3 August 1959), United Nations, *Treaty Series*, vol. 481, No. 6986, p. 329, amended by the

(4) Reference can also be made to other agreements concerning the presence of military forces with a less clear relation to armed conflict, such as the status of forces agreement between the United States and Australia, which contains a relevant provision on damage claims,⁴⁰ and the Enhanced Defence Cooperation Agreement between the United States and the Philippines, which contains provisions seeking to prevent environmental damage and provides for a review process.⁴¹ Moreover, the memorandum of special understanding between the United States and the Republic of Korea contains several provisions on environmental protection.⁴² Reference can further be made to arrangements applicable to short-term presence of foreign armed forces in a country for the purpose of exercises, transit by land or training.⁴³

(5) The draft principle also provides a non-exhaustive list of provisions on environmental protection that may be included in agreements concerning the presence of military forces in relation to armed conflict. Thus the second sentence of the draft principle mentions "preventive measures, impact assessments, restoration and clean-up measures" as examples of what provisions of environmental protection may address. The presence of military forces may risk having an adverse impact on the environment.⁴⁴ In order to avoid such adverse impact to the extent possible, measures of a preventive nature are of a great importance. Impact assessments are necessary to determine the kind of restoration and clean-up measures that may be needed at the conclusion of the presence of military forces.

(6) The measures referred to in the draft principle may address a variety of relevant aspects. Some precise examples that deserve specific mention as reflected in treaty practice are: the recognition of the importance of environmental protection, including the prevention of pollution on facilities and areas granted to the deploying State,⁴⁵ an understanding that the agreement will be implemented in a manner consistent with protecting the environment,⁴⁶ cooperation and sharing of information between the host State and the sending State regarding issues that could affect the health and environment for citizens,⁴⁷ measures to prevent environmental damage,⁴⁸ periodic environmental performance assessments,⁴⁹ review processes,⁵⁰ application of the environmental laws of the host State⁵¹

Agreements of 21 October 1971 and 18 March 1993 (hereinafter, "NATO-Germany Agreement"), art. 54A.

⁴⁰ Agreement concerning the Status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55 (hereinafter, "United States-Australia Agreement"), art. 12, para. 7 (e) (i).

⁴¹ Agreement between the Philippines and the United States on enhanced defense cooperation (Quezon City, 28 April 2014) (hereinafter, "United States-Philippines Agreement"). Available at www.official.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/.

⁴² Memorandum of Special Understandings on Environmental Protection, concluded between the United States and the Republic of Korea (Seoul, 18 January 2001) (hereinafter, "United States-Republic of Korea Memorandum"). Available at www.usfk.mil/Portals/105/Documents/SOFA/A12_MOSU_English/EnvProtection.pdf.

⁴³ See, e.g., Memorandum of Understanding between Finland and NATO regarding the provision of host nation support for the execution of NATO operations/exercises/similar military activity (4 September 2014), available at www.defmin.fi/files/2898/HNS_MOU_FINLAND.pdf, reference HE 82/2014. According to art. 53 (g), sending nations must follow host nation environmental regulations as well as any host nation's regulations for the storage, movement, or disposal of hazardous materials.

⁴⁴ See e.g. D.L. Shelton and S. Cutting, "If you break it, do you own it?", *Journal of International Humanitarian Legal Studies*, vol. 6 (2015), pp. 201–246, at pp. 210–211, and J. Taylor, "Environment and security conflicts: The U.S. Military in Okinawa", *The Geographical Bulletin*, vol. 48 (2007), pp. 6–7.

⁴⁵ See United States-Republic of Korea Memorandum.

⁴⁶ See United States-Iraq Agreement, art. 8.

⁴⁷ See United States-Republic of Korea Memorandum.

⁴⁸ See United States-Philippines Agreement, art. IX, para. 3, and NATO-Germany Agreement, art. 54A.

⁴⁹ These assessments could identify and evaluate the environmental aspects of the operation and can be accompanied by a commitment to plan, program and budget for these requirements accordingly, as in done the United States-Republic of Korea Memorandum.

⁵⁰ See United States-Philippines Agreement, art. IX, para. 2.

⁵¹ See NATO-Germany Agreement, art. 54A, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

or, similarly, a commitment by the deploying State to respect the host State's environmental laws, regulations and standards,⁵² a duty to respect international norms regarding the sustainable use of natural resources,⁵³ the taking of restorative measures where detrimental effects are unavoidable,⁵⁴ and the regulation of environmental damage claims.⁵⁵

(7) The phrase "as appropriate" signals two different considerations. First, agreements on the presence of military forces in relation to armed conflict are sometimes concluded under urgent circumstances in which it may not be possible to address issues of environmental protection. Second, sometimes it may be especially important that the agreement contains provisions on environmental protection. One such example is provided by a protected zone at risk of being affected by the presence of military forces. The phrase "as appropriate" therefore provides nuance to this provision and allows it to capture different situations.

Draft principle 8 **Peace operations**

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

Commentary

(1) Peace operations can relate to armed conflict in multiple ways. Previously, many peace operations were deployed following the end of hostilities and the signing of a peace agreement.⁵⁶ As the High-level Panel on Peace Operations noted, today many missions operate in environments where no such political agreements exist, or where efforts to establish one have failed.⁵⁷ Moreover, modern United Nations peacekeeping missions are multidimensional and address a range of peacebuilding activities, from providing secure environments to monitoring human rights, or rebuilding the capacity of a State.⁵⁸ Mandates also include the protection of civilians.⁵⁹ Draft principle 8 intends to cover all such peace operations that may relate to multifarious parts or aspects of an armed conflict, and may vary in temporal nature.

(2) The words "in relation to armed conflict" delineate the scope of the draft principle. They make clear the connection to armed conflict so as to ensure that the obligations are not to be interpreted too broadly (i.e. as potentially applying to every action of an international organization related to the promotion of peace). While the term is to be understood from a broad perspective in the context of the draft principle, it is recognized that not all such operations have a direct link to armed conflict.

⁵² See United States-Iraq agreement, art. 8.

⁵³ As is done in art. 9 of the *Concordia* status of forces agreement.

⁵⁴ See NATO-Germany Agreement, art. 54A.

⁵⁵ NATO-Germany Agreement, art. 41, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

⁵⁶ Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (contained in A/70/95-S/2015/446), para. 23.

⁵⁷ *Ibid.*

⁵⁸ V. Holt and G. Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (United Nations publication, Sales No. E.10.III.M.1), pp. 2-3.

⁵⁹ See for example the following mandates of United Nations-led missions found in Security Council resolutions: United Nations Mission in Sierra Leone (UNAMSIL) (1289 (2000)); United Nations Observer Mission in the Democratic Republic of the Congo (MONUC) (1291 (2000)); United Nations Mission in Liberia (UNMIL) (1509 (2003) and 2215 (2015)); United Nations Operation in Burundi (ONUB) (1545 (2004)); United Nations Stabilization Mission in Haiti (MINUSTAH) (1542 (2004)); United Nations Operation in Côte d'Ivoire (UNOCI) (1528 (2004) and 2226 (2015)); United Nations Mission in the Sudan (UNMIS) (1590 (2005)); African Union-United Nations Hybrid Operation in Darfur (UNAMID) (1769 (2007)); and United Nations Mission in the Central African Republic and Chad (MINURCAT) (1861 (2009)).

(3) The present draft principle covers operations where States and international organizations are involved in peace operations related to armed conflict and where groups of multiple actors may be present. All these actors will have some effect on the environment. For example, the Department of Peacekeeping Operations and the Department of Field Support recognize the potential damage by peacekeeping operations to the local environment.⁶⁰

(4) The environmental impact of a peace operation may stretch from the planning phase through its operational part, to the post-operation phase. The desired goal is that peace operations should undertake their activities in such a manner that the impact of their activities on the environment is minimized. The draft principle thus focuses on activities to be undertaken in situations where the environment would be negatively affected by a peace operation. At the same time, it is understood that "appropriate" measures to be taken may differ in relation to the context of the operation. The relevant considerations may include, in particular, whether such measures relate to the pre-, in-, or post- armed conflict phase, and what measures are feasible under the circumstances.

(5) The draft principle reflects the growing recognition on the part of States and international organizations such as the United Nations, the European Union,⁶¹ and NATO,⁶² to consider the environmental impact of peace operations and to take necessary measures to prevent, mitigate and remediate negative impacts. For example, some United Nations field missions have dedicated environmental units to develop and implement mission-specific environmental policies and oversee environmental compliance.⁶³

(6) There is no clear or definitive definition for "peace operation" or "peacekeeping" in existing international law, and the current draft principle is intended to cover broadly all such peace operations that relate to armed conflict. The Agenda for Peace highlighted that "peacemaking" was action to bring hostile parties to agreement, especially through peaceful means;⁶⁴ "peacekeeping" was the deployment of a United Nations presence in the field, involving military and/or police personnel, and frequently civilians as well;⁶⁵ while "peacebuilding" was to take the form of cooperative projects in a mutually beneficial undertaking to enhance the confidence fundamental to peace.⁶⁶ The report of the High-level Independent Panel on Peace Operations includes, for its purposes, "a broad suite of tools ... from special envoys and mediators; political missions, including peacebuilding missions; regional preventive diplomacy offices; observation missions, including both ceasefire and electoral missions; to small, technical-specialist missions such as electoral support missions; multidisciplinary operations".⁶⁷ The term "peace operations" is thus aimed to cover all these types of operations, and operations broader than United Nations peacekeeping operations, including peace enforcement operations and operations by regional organizations. There is no reference in the text to "multilateral" peace operations, as it was considered unnecessary to address this expressly in the draft principle. The general

⁶⁰ See United Nations, Department of Peacekeeping Operations and the Department of Field Support, "DFS Environment Strategy" (2017). Available at https://peacekeeping.un.org/sites/default/files/171116_dfs_exec_summary_environment_0.pdf (accessed on 8 May 2018). The strategy is complemented by an environmental policy and environmental guidelines on environment for United Nations field missions (see footnote 25 above).

⁶¹ See, e.g., European Union, "Military Concept on Environmental Protection and Energy Efficiency for EU-led military operations", 14 September 2012, document EEAS 01574/12.

⁶² See, e.g., NATO, "Joint NATO doctrine for environmental protection during NATO-led military activities", 8 March 2018, document NSO(Joint)0335(2018)EP/7141.

⁶³ "The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations", Report of the Secretary-General (A/70/357-S/2015/682), para. 129.

⁶⁴ "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping" (A/47/277-S/24111), para. 20. See also the supplement thereto, a position paper by the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, para. 56.

⁶⁷ A/70/95-S/2015/446, para. 18.

understanding of the term "peace operations" is nevertheless that it also concerns multilateral operations.

(7) "Prevent" has been used in acknowledgement of the fact that peace operations are not isolated in nature, and that in planning their actions, actors should plan or aim to minimize negative environmental consequences. While the prevention obligation requires action to be taken at an early stage, the notion of "mitigation" refers to reduction of harm that has already occurred. The notion of "remediation", in turn, has been used in the same sense as "remedial measures" in draft principle 2, encompassing any measure that may be taken to restore the environment.

(8) Draft principle 8 is distinctly separate in character from draft principle 7 and entails different obligations from those contained in the latter. Peace operations, unlike agreements concerning the presence of military forces in relation to armed conflict, do not necessarily involve armed forces or military personnel. Other types of actors such as civilian personnel and various types of specialists may also be present and covered by such operations. Draft principle 8 is also intended to be broader and more general in scope, and to direct focus on the activities of such peace operations.

(9) It is understood that the draft principle also encompasses reviews of concluded operations that would identify, analyse and evaluate any environmentally detrimental effects of those operations on the environment. This would be a "lessons learned" type of exercise to seek to avoid or minimize the negative effects of future peace operations on the environment and ensure that mistakes are not repeated.

Draft principle 14

Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Commentary

(1) Draft principle 14 aims to reflect that environmental considerations are, to a greater extent than before, being taken into consideration in the context of contemporary peace processes, including through the regulation of environmental matters in peace agreements.

(2) Including the term "peace process" in the draft principle is intended to broaden its scope to cover the entire peace process, as well as any formal peace agreements concluded.⁶⁸ Modern armed conflicts have a variety of outcomes that do not necessarily take the form of formal agreements. For example, at the end of an armed conflict, a ceasefire agreement, an armistice or a situation of *de facto* peace with no agreement could be reached. A peace process may also begin well before the actual end of an armed conflict. The conclusion of a peace agreement thus represents only one aspect, which, if at all, may take place several years after the cessation of hostilities. For this purpose, and to also avoid any temporal *lacuna*, the words "as part of the peace process" have been employed. The outcome of a peace process often involves different steps and the adoption of a variety of instruments.

⁶⁸ The United Nations peace agreements database, a "reference tool providing peacemaking professionals with close to 800 documents that can be understood broadly as peace agreements and related material", contains a huge variety of documents, such as "formal peace agreements and sub-agreements, as well as more informal agreements and documents such as declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, exchanges of letters and key outcome documents of some international or regional conferences ... The database also contains selected legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations". Selected resolutions of the Security Council are also included. The database is available at <http://peacemaker.un.org/document-search>.

(3) The phrase “[p]arties to an armed conflict” is used in paragraph 1 to indicate that the provision covers both international and non-international armed conflicts. This is in line with the general understanding that the draft principles apply to international, as well as non-international armed conflicts.

(4) The word “should” is used to reflect the normative value of the obligation, while also recognizing that it does not correspond to any existing legal obligation.

(5) The draft principle is cast in general terms to accommodate the wide variety of situations that may exist after an armed conflict. The condition of the environment after an armed conflict can vary greatly depending on a number of factors.⁶⁹ In some instances, the environment may have suffered serious and severe damage which is immediately apparent and which may need to be addressed as a matter of urgency; whereas, in others, the damage the environment has suffered may not be so significant as to warrant urgent restoration.⁷⁰ Some environmental damage may only become apparent months or even years after the armed conflict has ended.

(6) The draft principle aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process, whether concluded between two or more States, between State(s) and non-State armed group(s), or between two or more non-State armed group(s). Such agreements and instruments may take different forms, such as sub-agreements to formal peace agreements, informal agreements, declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, as well as relevant legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations.⁷¹

(7) Some modern peace agreements contain environmental provisions.⁷² The types of environmental matters that have been addressed in the instruments concluded during the

⁶⁹ For example, the intensity and duration of the conflict as well as the weapons used can all influence how much environmental damage is caused in a particular armed conflict.

⁷⁰ Well-known examples of environmental damage caused in armed conflict is the damage caused by the United States Armed Forces’ use of Agent Orange in the Viet Nam War and the burning of Kuwaiti oil wells by Iraqi troops in the Gulf War, which are well documented. Instances of environmental damage, which range in severity, have also been documented other armed conflicts, such as the conflicts in Colombia, as well as in the Democratic Republic of the Congo, Iraq and Syria. See UNEP Colombia, available at www.unenvironment.org/news-and-stories/story/un-environment-will-support-environmental-recovery-and-peacebuilding-post (accessed on 9 May 2018); UNEP, “Post-conflict environmental assessment of the Democratic Republic of the Congo”, available at https://postconflict.unep.ch/publications/UNEP_DRC_PCEA_EN.pdf (accessed on 9 May 2018); UNEP, “Post-conflict environmental assessment, clean-up and reconstruction in Iraq”, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17462/UNEP_Iraq.pdf?sequence=1&isAllowed=y (accessed on 9 May 2018); “Lebanon Environmental Assessment of the Syrian Conflict” (supported by UNDP and EU), available at www.undp.org/content/dam/lebanon/docs/Energy%20and%20Environment/Publications/EASC-WEB.pdf (accessed on 9 May 2018). See also International Law and Policy Institute, “Protection of the natural environment in armed conflict: an empirical study” (Oslo, 2014), pp. 34–40.

⁷¹ See C. Bell, “Women and peace processes, negotiations, and agreements: operational opportunities and challenges”, Norwegian Peacebuilding Resource Centre, Policy Brief, March 2013, available at <http://noref.no> under “Publications”, p. 1.

⁷² Such instruments are predominantly concluded in non-international armed conflicts, between a State and a non-State actor and include the following: Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (Chapultepec Agreement) (Mexico City, 16 January 1992), A/46/864, annex, chap. II; Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords), S/1999/648, annex; Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), available from <http://peacemaker.un.org/node/1207>, Protocol III, at p. 62, art. 12, para. 3 (e), and Protocol IV, at p. 81, art. 8 (h); Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from <http://peacemaker.un.org/drc-suncity-agreement2003>, resolution No. DIC/CEF/03, pp. 40–41, and resolution No. DIC/CHSC/03, pp. 62–65; Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army, available from <http://peacemaker.un.org/node/1369>, chap. V, p. 71 and

peace process or in peace agreements include, for example, obligations for or encouragement to parties to cooperate regarding environmental issues, and provisions that set out in detail the authority that will be responsible for matters relating to the environment, such as preventing environmental crimes and enforcing national laws and regulations on natural resources and the sharing of communal resources.⁷³ The present draft principle aims to encourage parties to consider including such provisions in the agreements.

(8) Paragraph 2 aims to encourage relevant international organizations to take environmental considerations into account when they act as facilitators in peace processes. The wording of the paragraph is intended to be broad enough to cover situations where Chapter VII resolutions of the United Nations Security Council have been passed, as well as situations where relevant international organizations play a facilitating role at the consent of the relevant State or parties to an armed conflict in question.

(9) Paragraph 2 refers to "relevant international organizations" to signal that not all organizations are suited to address this particular issue. The organizations that are envisioned as being relevant in the context of this draft principle include those that have been recognized as playing an important role in the peace processes of various armed conflicts in the past, *inter alia*, the United Nations and its organs in particular, as well as the African Union, the European Union, the Association of Southeast Asian Nations and the Organization of American States.⁷⁴ The draft principle also includes the words "where appropriate" to reflect the fact that the involvement of international organizations for this purpose is not always required, or wanted by the parties.

chap. III, p. 45, which set out as guiding principles that "the best known practices in the sustainable utilization and control of natural resources shall be followed" (para. 1.10) — further regulations on oil resources are found in paras. 3.1.1 and 4; Darfur Peace Agreement (Abuja, 5 May 2006), available from <http://peacemaker.un.org/node/535>, chap. 2, at p. 21, art. 17, para. 107 (g) and (h), and at p. 30, art. 20; Agreement on comprehensive solutions between Uganda and Lord's Resistance Army/Movement (Juba, 2 May 2007), available from https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf, para. 14.6, and the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), S/1999/777, annex, art. VII.

⁷³ Chapultepec Agreement, chap. II. Further regulations are found in art. 13 contained in annex II to the Peace Agreement; they prescribe that it is the role of the Environment Division of the National Civil Police to "be responsible for preventing and combating crimes and misdemeanours against the environment". The Arusha Peace and Reconciliation Agreement for Burundi, Protocol III, at p. 62, art. 12, para. 3 (e), and at p. 81, art. 8 (h), contains several references to the protection of the environment, one of which prescribes that one of the missions of the intelligence services is "[t]o detect as early as possible any threat to the country's ecological environment". Furthermore, it states that "[t]he policy of distribution or allocation of new lands shall take account of the need for environmental protection and management of the country's water system through protection of forests".

⁷⁴ The United Nations has acted as a facilitator in numerous armed conflicts, *inter alia* the armed conflicts in Angola, the Democratic Republic of the Congo, Libya and Mozambique. Regional organizations have also played a facilitating role in the peace processes across the world. For example, the African Union has been involved in aspects of the peace processes in, *inter alia*, Comoros, Côte d'Ivoire, Guinea-Bissau, Liberia and Somalia. See Chatham House, Africa Programme, "The African Union's role in promoting peace, security and stability: from reaction to prevention?", meeting summary, available from www.chathamhouse.org, p. 3. The Organization of American States was involved in the peace process in, *inter alia*, the Plurinational State of Bolivia and Colombia. See P.J. Meyer, "Organization of American States: background and issues for Congress" (Congressional Research Service, 2014), available at www.fas.org, p. 8. See also African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: Towards more inclusive processes*, vol. 3 (2013), p. 106. The European Union has been involved in the peace processes in armed conflicts in, *inter alia*, the Middle East and Northern Ireland. See also Switzerland, Federal Department of International Affairs, "Mediation and facilitation in today's peace processes: centrality of commitment, coordination and context", presentation by Thomas Greminger, a retreat of the International Organization of la Francophonie, 15–17 February 2007, available from www.swisspeace.ch, under "Publications".

Draft principle 15**Post-armed conflict environmental assessments and remedial measures**

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

Commentary

(1) The purpose of draft principle 15 is to encourage relevant actors to cooperate in order to ensure that environmental assessments and remedial measures can be carried out in post-conflict situations. The draft principle is closely linked to draft principle 8.

(2) The reference to "relevant actors" includes both State and non-State actors. Not only States, but also a wide range of actors, including international organizations and non-State actors, have a role to play in relation to environmental assessments and remedial measures. The phrase "are encouraged" is hortatory in nature and is to be seen as an acknowledgment of the scarcity of practice in this field.

(3) The term "environmental assessment" is distinct from an "environmental impact assessment", which is typically undertaken *ex ante* as a preventive measure.⁷⁵ Such assessments play an important role in the preparation and adoption of plans, programmes, and policies and legislation, as appropriate. This may involve the evaluation of the likely environmental, including health, effects, in a plan or programme.⁷⁶

(4) It is in this context that a post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the development plans in the post-conflict phase. Such assessments are typically intended to identify major environmental risks to health, livelihoods and security and to provide recommendations to national authorities on how to address them.⁷⁷ A post-conflict environmental assessment is intended to meet various needs and policy processes, which, depending on the requirements, are distinct in scope, objective and approach.⁷⁸ Such post-conflict environmental assessment, undertaken at the request of a State, may be take the form of: (a) a needs assessment;⁷⁹ (b) a quantitative risk assessment;⁸⁰ (c) a strategic assessment;⁸¹ or (d) a comprehensive assessment.⁸² The comprehensive assessment of Rwanda, for example, involved a scientific expert evaluation and assessment, covering a range of activities, including scoping, desk

⁷⁵ See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

⁷⁶ Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, available at www.uncece.org/fileadmin/DAM/env/cia/documents/legaltexts/protocolenglish.pdf.

⁷⁷ Post-crisis environmental assessment, available at <http://drustage.unep.org/disastersandconflicts/what-we-do/preparedness-response/post-crisis-environmental-assessment>.

⁷⁸ D. Jensen, "Evaluating the impact of UNEP's post conflict environmental assessments", *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, Jensen and S. Loneragan (eds.), available at https://environmentalpeacebuilding.org/assets/Documents/LibraryItem_000_Doc_061.pdf, p. 18.

⁷⁹ A needs assessment and desk study can be done during or after a conflict, based on a collection pre-existing secondary information on environmental trends and natural resource management, challenges from international and national sources. Such information, with limited verification field visits, is then compiled into a desk study report that attempts to identify and prioritize environmental needs. *Ibid.*, pp. 18–19.

⁸⁰ A quantitative risk assessment, involving field visits, laboratory analysis and satellite imagery, focuses on the direct environmental impact of conflicts caused by bombing and destruction of buildings, industrial sites, and public infrastructure. *Ibid.*, pp. 19–20.

⁸¹ A strategic assessment evaluates the indirect impact of the survival and coping strategies of local people and the institutional problems caused by the breakdown of governance and capacity. These tend to be longer in duration. *Ibid.*, p. 20.

⁸² A comprehensive assessment seeks to provide a detailed picture of each natural resource sector and the environmental trends, governance challenges, and capacity needs. Based on national consultations with stakeholders, comprehensive assessments attempt to identify priorities and cost the required interventions over the short, medium, and long term. *Ibid.*, p. 20.

study, field work, environmental sampling, geographic information system modelling, analysis and reporting and national consultations. It is readily acknowledged that "conflicts often have environmental impacts, direct or indirect, that affect human health and livelihoods as well as ecosystem services".⁸³

(5) Such assessments are encouraged because, if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may lead to "further population displacement and socio-economic instability", thereby "undermining recovery and reconstruction in post-conflict zones" and "triggering a vicious cycle".⁸⁴

(6) In order to align the text with other draft principles, in particular draft principle 2, the term "remedial" is used in the present principle even though "recovery" has a more prominent usage in the practice. Once an assessment is completed, the challenge is to ensure that environmental recovery programmes are in place that aim at strengthening the national and local environmental authorities, rehabilitate ecosystems, mitigate risks and ensure sustainable utilization of resources in the context of the concerned State's development plans.⁸⁵ The term "remedial measures" has a more limited remit than "recovery".

Draft principle 16 **Remnants of war**

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Commentary

(1) Draft principle 16 aims to strengthen the protection of the environment in a post-conflict situation. It seeks to ensure that toxic and hazardous remnants of war that are or that may cause damage to the environment are removed or rendered harmless after an armed conflict. This draft principle covers toxic and hazardous remnants of war on land, as well as those which have been placed or dumped at sea, as long as they fall under the jurisdiction or control of a former party to the armed conflict. The measures taken shall be subject to the applicable rules of international law.

(2) Paragraph 1 is cast in general terms. Remnants of war take various forms. They consist of not only explosive remnants of war but also other hazardous material and objects. Some remnants of war are not dangerous to the environment at all or may be less dangerous if they remain where they are after the conflict is over.⁸⁶ In other words, removing the

⁸³ DAC Network on Environment and Development Cooperation (ENVIRONET), "Strategic environment assessment and post-conflict development SEA toolkit" (2010), p. 4, available at http://content-ext.undp.org/aplaws_publications/2078176/Strategic%20Environment%20Assessment%20and%20Post%20Conflict%20Development%20full%20version.pdf.

⁸⁴ *Ibid.*

⁸⁵ UNEP, "Disasters and Conflicts Programme", available at http://www.un.org/en/events/environmentconflictday/pdf/UNEP_conflict_and_disaster_brochure.pdf, p. 3.

⁸⁶ For example, this is often the case with chemical weapons that have been dumped at sea. See T.A. Mensah, "Environmental damages under the Law of the Sea Convention", *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, J.E. Austin and C.E. Bruch

remnants of war may in some situations pose a higher environmental risk than leaving them where they are. It is for this reason that the draft principle contains the words "or render harmless", to illustrate that in some circumstances it may be appropriate to do nothing, or to take measures other than removal.

(3) The obligation to "seek to" is one of conduct and relates to "toxic and hazardous remnants of war" that "are causing or risk causing damage to the environment". The terms "toxic" and "hazardous" are often used when referring to remnants of war which pose a danger to humans or the environment, and it was considered appropriate to use the terms here.⁸⁷ The term "hazardous" is somewhat wider than the term "toxic", in that all remnants of war that pose a threat to humans or the environment may be considered hazardous, but not all are toxic. The term "toxic remnants of war" does not have a definition under international law, but has been used to describe "any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems".⁸⁸

(4) The reference to "jurisdiction or control" is intended to cover areas within *de jure* and *de facto* control even beyond that established by a territorial link. The term "jurisdiction" is intended to cover, in addition to the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority extraterritorially.⁸⁹ The term "control" is intended to cover situations in which a State (or party to an armed conflict) is exercising *de facto* control, even though it may lack *de jure* jurisdiction.⁹⁰ It therefore "refers to the factual capacity of effective control over activities outside the jurisdiction of a State".⁹¹

(5) The present draft principle is intended to apply to international as well as non-international armed conflicts. For this reason, paragraph 1 addresses "parties to a conflict". The phrase "party to a conflict" has been used in various provisions of law of armed conflict treaties in the context of remnants of war.⁹² It was considered appropriate to use the

(eds.) (Cambridge, Cambridge University Press, 2000), pp. 226–249. The Chemical Munitions Search and Assessment (CHEMSEA) is an example of a project of cooperation among the Baltic States, which is partly financed by the European Union. Information on the CHEMSEA project can be found at http://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tacklesproblem-of-chemical-munitions-in-the-baltic-sea. See also the Baltic Marine Environment Protection Commission (Helsinki Commission) website at www.helcom.fi/baltic-sea-trends/hazardous-substances/sea-dumped-chemical-munitions.

⁸⁷ See, for more information, ICRC, "Strengthening legal protection for victims of armed conflicts", report prepared for the Thirty-first International Conference of the Red Cross and Red Crescent in 2011, No. 311C/11/5.1.1.3, p. 18.

⁸⁸ See M. Ghalaiey, "Toxic harm: humanitarian and environmental concerns from military-origin contamination", discussion paper (Toxic Remnants of War project, 2013), p. 2. See also www.toxicremnantsofwar.info/new-trw-publication-toxic-harm-humanitarian-and-environmental-concerns-from-military-origin-contamination/. For more information on toxic remnants of war, see also the Geneva Academy, *Weapons Law Encyclopedia*, available at www.weaponslaw.org under "Glossary", which cites ICRC, "Strengthening legal protection for victims of armed conflicts", p. 18. See the statements delivered by Austria, Costa Rica, Ireland and South Africa to the First Committee of the General Assembly as its sixty-eighth session, which are available from the paper-smart portal at <http://papersmart.unmeetings.org>.

⁸⁹ See para. (9) of the commentary to draft art. 1 of the draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

⁹⁰ Para. (12) of the commentary to draft art. 1, *ibid.*

⁹¹ A/CN.4/692, para. 33. Concerning the concept of "control", see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 54, para. 118, where it states that: "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."

⁹² See, for example, Protocol II to the Convention on Certain Conventional Weapons, as well as the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to

term in the present draft principle as it is foreseeable that there may be situations where there are toxic or hazardous remnants of war in an area where a State does not have full control. For example, a non-State actor may have control over territory where toxic and hazardous remnants of war are present.

(6) Paragraph 2 should be read together with paragraph 1. It aims to encourage cooperation and technical assistance amongst parties to render harmless the remnants of war referred to in paragraph 1. It should be noted that paragraph 2 does not aim to place any new international law obligations on parties to cooperate. However, it is foreseeable that there may be situations where an armed conflict has taken place and a party is not in a position to ensure that toxic and hazardous remnants of war are rendered harmless. It was thus considered valuable to encourage parties to cooperate in this regard.

(7) Paragraph 3 contains a without prejudice clause that aims to ensure that there would be no uncertainty that existing treaty or customary international law obligations prevail. There are various laws of armed conflict treaties that regulate remnants of war, and different States thus have varying obligations relating to remnants of war.⁹³

(8) The words "clear, remove, destroy or maintain", as well as the specific remnants of war listed, namely "minefields, mined areas, mines, booby-traps, explosive ordnance and other devices", were specifically chosen and are derived from existing law of armed conflict treaties to ensure that the paragraph is based on the law of armed conflict as it exists at present.⁹⁴

(9) It should be noted that the draft principle does not directly deal with the issue of responsibility or reparation for victims on purpose. This is because responsibility to clear, remove, destroy or maintain remnants of war is already regulated to some extent under the existing law of armed conflict, at least in the sense that certain treaties identify who should take action.⁹⁵ The draft principle is without prejudice to the allocation of responsibility and questions of compensation.

have Indiscriminate Effects (Protocol V) (hereinafter, "Protocol V to the Convention on Certain Conventional Weapons") (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2399, No. 22495, p. 100.

⁹³ See, for example, amended Protocol II to the Convention on Certain Conventional Weapons; Protocol V to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211; Convention on Cluster Munitions (Dublin, 30 May 2008), *ibid.*, vol. 2688, No. 47713, p. 39; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Geneva, 3 September 1992), *ibid.*, vol. 1974, No. 33757, p. 45.

⁹⁴ See the wording of the amended Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Convention on Cluster Munitions.

⁹⁵ See, e.g., art. 3, para. 2, of the amended Protocol II Convention on Certain Conventional Weapons: "Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol." Art. 10, para. 2, in turn provides that: "High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control." In addition, art. 3, para. 2, of Protocol V to the Convention on Certain Conventional Weapons provides that: "After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control"; Convention on Cluster Munitions, art. 4, para. 1: "Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control"; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 5, para. 1: "Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control".

Draft principle 17
Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

Commentary

(1) Unlike the broader draft principle 16, which deals with remnants of war more generally, draft principle 17 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. Draft principle 17 has added value as draft principle 16 only covers remnants of war under the jurisdiction or control of a former party to an armed conflict, which means that it is not wide enough to cover all remnants of war at sea. This draft principle expressly encourages international cooperation to ensure that remnants of war at sea do not constitute a danger to the environment.⁹⁶

(2) Owing to the multifaceted nature of the law of the sea, a particular State could have sovereignty, jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction, depending on where the remnants are located.⁹⁷ It is therefore not surprising that remnants of war at sea pose significant legal challenges.⁹⁸ For example, the parties to the armed conflict may have ceased to exist, the coastal State may not have the resources to ensure that the remnants of war at sea do not constitute a danger to the environment, the coastal State may not have been a former party to the conflict, but the cooperation of that State may still be needed in efforts to get rid of remnants. Another foreseeable challenge is that the party that left the remnants may not have been in violation of its international law obligations at the time when that happened but these remnants now pose environmental risk.

(3) Accordingly, draft principle 17 addresses States generally, not only those which have been involved in an armed conflict. It aims to encourage all States, as well as relevant international organizations,⁹⁹ to cooperate to ensure that remnants of war at sea do not constitute a danger to the environment. The reference to "international organizations" is qualified with the word "relevant", in the light of the fact that the issues involved tend to be specialized.

(4) The words "should cooperate" rather than the more prescriptive "shall cooperate" were considered appropriate, given that this is an area where practice is still developing. Cooperation is an important element concerning remnants of war at sea, as the coastal States negatively affected by remnants of war at sea may not have the resources and thus not be capable of ensuring that remnants of war at sea do not pose environmental risks.

⁹⁶ The need to take cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea has been explicitly recognized by the General Assembly since 2010, including in General Assembly resolution 71/220. The resolution reaffirms the 2030 Agenda for Sustainable Development and recalls a number of relevant international and regional instruments. It furthermore notes the importance of raising awareness of the environmental effects related to waste originating from chemical weapons dumped at sea and invites the Secretary General to seek the views of Member States and relevant regional and international organizations on the cooperative measures envisaged in the resolution and identifying the appropriate intergovernmental bodies within the United Nations for further consideration and implementation, as appropriate, of those measures.

⁹⁷ See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3. The remnants of war could be located in the territorial waters, the continental shelf, the exclusive economic zone or on the high seas, and this will have an impact on the rights and obligations of States.

⁹⁸ See A. Lott, "Pollution of the Marine Environment by Dumping: Legal Framework Applicable to Dumped Chemical Weapons and Nuclear Waste in the Arctic Ocean" 1 *Nordic Environmental Law Journal* (2015), p. 57 and W. Searle and D. Moody, "Explosive Remnants of War at Sea: Technical Aspects of Disposal", *Explosive Remnants of War: Mitigating the Environmental Effects*, A. Westing (ed.) (Taylor & Francis 1985).

⁹⁹ For example, the CHEMSEA project, which was initiated in 2011 as a project of cooperation among the Baltic States and partly financed by the European Union (see footnote 86 above).

(5) There are various ways in which States and relevant international organizations can cooperate to ensure that remnants of war at sea do not pose environmental risks. For example, they could survey maritime areas and make the information freely available to the affected States, they could provide maps with markers, and they could provide technological and scientific information and information concerning whether the remnants pose risks or may pose risks in the future.

(6) There is increasing awareness concerning the environmental effects of remnants of war at sea.¹⁰⁰ Dangers posed to the environment by remnants of war at sea could have significant collateral damage to human health and safety, especially of seafarers and fishermen.¹⁰¹ The clear link between danger to the environment and public health and safety has been recognized in several international law instruments, and it was thus considered particularly important to encourage the cooperation amongst States and international organizations to ensure that remnants of war at sea do not pose danger.¹⁰²

(7) Draft principle 17 intentionally does not deal with the any issues concerning the allocation of responsibility or compensation for damages regarding of remnants of war at sea. Determining which party has the primary obligation to ensure that remnants of war at sea do not pose environmental risks is a very complex and delicate issue to define, especially considering the varied legal nature of the law of the sea, ranging from internal waters to the high seas.

Draft principle 18

Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft principle 18 refers generally to "States", as this term is broader than "parties to an armed conflict". States not parties to an armed conflict may be affected as third States, and may have relevant information useful for the taking of remedial measures that could usefully be provided to other States or international organizations. This obligation applies to States, even though non-State actors are addressed in other draft principles, and the set of draft principles covers both international and non-international armed conflicts.

¹⁰⁰ See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013 and A/68/258. See also Mensah, "Environmental damages under the Law of the Sea Convention", p. 233.

¹⁰¹ The Baltic Marine Environment Protection Commission (Helsinki Commission), governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, issued guidelines for fishermen that encounter sea-dumped chemical munitions at an early stage. For an easily accessible overview see the work done by the James Martin Center for Nonproliferation Studies at www.nonproliferation.org/chemical-weapon-munitions-dumped-at-sea/.

¹⁰² There is a clear link between danger to the environment and public health and safety. See, for example, art. 55, para. 1, of Additional Protocol I provides for the protection of the natural environment in international armed conflicts and prohibits the use of means and methods of warfare which are intended or may be expected to cause environmental damage and thereby prejudice the health of the population; art. 1, para. 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, stipulates that adverse effects on the environment include: "effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

(2) While States are typically the most relevant subjects, the draft principle also refers to international organizations, with the addition of the qualifier "relevant". The specific term "national defence" applies only to States. For some international organizations, confidentiality requirements may also affect the extent of information that they can share or grant access to in good faith.¹⁰³

(3) While the term "share" refers to information provided by States and international organizations in their mutual relations and as a means of cooperation, the term "granting access" refers primarily to allowing access to individuals for example to such information, and thus signifies a more unilateral relationship.

(4) The obligation to share and grant access to information pertaining to the environment can be found in numerous sources of international law, both at global and regional level.

(5) The origins of the right to access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights,¹⁰⁴ as well as in article 19 of the International Covenant on Civil and Political Rights.¹⁰⁵ General comment No. 34 on article 19 of the International Covenant on Civil and Political Rights provides that article 19, paragraph 2, should be read as including a right to access to information held by public bodies.¹⁰⁶

(6) A right to environmental information has also developed within the context of the European Convention on Human Rights as exemplified in the case of *Guerra and Others v. Italy*,¹⁰⁷ in which the European Court of Human Rights decided that the applicants had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy). Reference can also be made to the European Union directive on public access to environmental information and to a related judgment of the European Court of Justice of 2011.¹⁰⁸ In addition to the right to privacy, a right to environmental information has also been based on the right to freedom of expression (as in e.g. *Claude-Reyes et al. v. Chile* before the Inter-American Court of Human Rights).¹⁰⁹

(7) Principle 10 of the 1992 Rio Declaration also provides that individuals shall have appropriate access to information, including on hazardous materials. The recently adopted Sustainable Development Goal 16 on peaceful and inclusive societies calls upon States to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.¹¹⁰

(8) Article 2 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) defines "environmental information" as any information pertaining to the state of elements of the environment, factors affecting or likely to affect elements of the environment, as well as the state of human health and safety insofar as it may be affected by these elements.¹¹¹

¹⁰³ Cf. e.g. Office of the United Nations High Commissioner for Refugees (UNHCR), *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (2015), available at www.refworld.org/pdfid/55643c1d4.pdf.

¹⁰⁴ General Assembly resolution 217 (III) A of 10 December 1948.

¹⁰⁵ New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

¹⁰⁶ Human Rights Committee, general comment No. 34 (2011) on article 19 (freedom of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40) (Vol. I), annex V, para. 18.

¹⁰⁷ *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

¹⁰⁸ Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information; *Office of Communications v. Information Commissioner*, case C-71/10, judgment of 28 July 2011.

¹⁰⁹ *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgment of 19 September 2006 (merits, reparations and costs), Series C, No. 151 (2006).

¹¹⁰ General Assembly resolution 70/1 of 25 September 2015.

¹¹¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447, art. 2.

Article 4 of the Aarhus Convention stipulates that State parties must "make such [environmental] information available to the public, within the framework of national legislation". Such a right necessarily entails a duty for States to collect such environmental information for the purposes of making it available to the public if and when requested to do so.

(9) The United Nations Framework Convention on Climate Change addresses access to information in its article 6, noting that the Parties shall "[p]romote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: ... public access to information on climate change and its effects".¹¹² In addition, the Cartagena Protocol on Biosafety to the Convention stipulates that Parties shall promote and facilitate access to information on living modified organisms.¹¹³ Both the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,¹¹⁴ and the Stockholm Convention on Persistent Organic Pollutants¹¹⁵ contain provisions on access to information. Similarly, article 18 of the 2013 Minamata Convention on Mercury¹¹⁶ stipulates that Parties shall "promote and facilitate" access to such information. The recently concluded Paris Agreement similarly addresses access to information in numerous paragraphs and articles, e.g. as part of the responsibility for States to provide intended nationally determined contributions in article 4, paragraph 8, of the Agreement, and more generally regarding climate change education and public access to information in article 12.¹¹⁷

(10) In accordance with the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Parties thereto shall make information on desertification "fully, openly and promptly available".¹¹⁸ Similarly, the 2010 Bali Guidelines provide that "affordable, effective and timely access to environmental information held by public authorities upon request" should be ensured.¹¹⁹

(11) Within the particular regime of humanitarian demining and remnants of war, a number of instruments contain requirements on providing environmental information. For instance, a request to extend the deadline for completing the clearance and destruction of cluster munition remnants under the Convention on Cluster Munitions must outline any potential environmental and humanitarian impacts of such an extension.¹²⁰ Similarly, in connection to the destruction of cluster munitions, the "location of all destruction sites and the applicable safety and environmental standards" must be outlined.¹²¹ Similar obligations

¹¹² United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30882, p. 107.

¹¹³ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, art. 23.

¹¹⁴ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998), United Nations, *Treaty Series*, vol. 2244, No. 39973, p. 337, art. 15.

¹¹⁵ Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119, art. 10.

¹¹⁶ Text available from <https://treaties.un.org> (*Status of Multilateral Treaties Deposited with the Secretary General*, chap. XXVII.17).

¹¹⁷ Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the Conference of the Parties (FCCC/CP.2015/10/Add.1), decision 1/CP.21, annex.

¹¹⁸ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (opened for signature, Paris, 14 October 1994), United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3, art. 16, also art. 19.

¹¹⁹ United Nations Environment Programme, Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/3, part A, of 26 February 2010. Available from www.unep.org under "Resources".

¹²⁰ Art. 4, para. 6 (h).

¹²¹ Art. 7 (transparency measures), para. 1 (e).

are contained in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.¹²² Reference can also be made to the International Mine Action Standard 10.70, which states, *inter alia*, that national mine action authorities should "promulgate information about significant environmental incidents to other demining organizations within the programme".¹²³

(12) Regarding the practice of international organizations, the Environmental Policy for United Nations Field Missions of 2009 stipulates that peacekeeping missions shall assign an Environmental Officer with the duty to "[p]rovide environmental information relevant to the operations of the mission and take actions to promote awareness on environmental issues".¹²⁴ The policy also contains a requirement to disseminate and study information on the environment, which would presuppose access to information that can in fact be disseminated and that thus is not classified.

(13) Moreover, the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict contain a provision on protection of organizations,¹²⁵ which could include environmental organizations gathering environmental data as a means of "contributing to prevent or repair damage to the environment".¹²⁶

(14) In connection with post-armed conflict environmental assessments, it is worth recalling that the UNEP guidelines on integrating environment in post-conflict assessments include a reference to the importance of public participation and access to information, as "natural resource allocation and management is done in an ad-hoc, decentralized, or informal manner" in post-conflict contexts.¹²⁷

(15) The obligation to share information and to cooperate in this context is reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses.¹²⁸ Moreover, the Convention on Biological Diversity contains a provision on exchange of information as article 14, requiring that each Contracting Party shall, as far as possible and as appropriate, promote "notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate".¹²⁹ In addition, article 17 of the Convention calls upon the Parties to facilitate the exchange of information relevant to the conservation and sustainable use of biological diversity.

(16) Previous work of the Commission of relevance to this aspect of the draft principle includes the articles on nationality of natural persons in relation to the succession of States (1999),¹³⁰ articles on prevention of transboundary harm from hazardous activities (2001),¹³¹

¹²² Art. 3.

¹²³ IMAS 10.70, 1 October 2007, "safety and occupational health, protection of the environment", para. 12.1 (a), available from www.mineactionstandards.org.

¹²⁴ United Nations, Department of Peacekeeping Operations and Department of Field Support, "Environmental Policy for United Nations Field Missions", 2009, para. 23.5.

¹²⁵ See ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, *Annex*, 2013, annex, guideline 19, referring to Geneva Convention IV, art. 63, para. 2, and Additional Protocol I, arts. 61–67.

¹²⁶ It should be noted that guideline 19 refers to pursuant to special agreements between the parties or permission granted by one of them.

¹²⁷ UNEP, Guidance Note, Integrating Environment in Post-Conflict Needs Assessments (Geneva, 2009), available from http://postconflict.unep.ch/publications/environment_toolkit.pdf (as referenced in para. 144 and footnote 238 of A/CN.4/L.922).

¹²⁸ Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1978), *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49* (A/51/49), vol. III, resolution 51/229, annex, arts. 9, 11, 12, 14–16, 19, 30, 31 and 33, para. 7.

¹²⁹ Art. 14, para. 1 (c).

¹³⁰ General Assembly resolution 55/153 of 12 December 2000, annex, art. 18. The draft articles and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

¹³¹ Arts. 8, 12–14 and 17.

principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006)¹³² and the articles on the law of transboundary aquifers (2008).¹³³

(17) The expression "in accordance with their obligations under international law" reflects that treaties contain obligations relevant in the context of the protection of the environment in relation to armed conflicts, which may be instrumental for the purpose of the taking of remedial measures after an armed conflict,¹³⁴ such as, for instance, keeping a record of the placement of landmines. Obligations to grant access to and/or share information which provide protection for the environment in relation to armed conflicts have been listed above. Also relevant is paragraph 2 of article 9 on "Recording and use of information on minefields, mined areas, mines, booby-traps and other devices" of Protocol II to the Convention on Certain Conventional Weapons, as well as article 4, paragraph 2, on "Recording, retaining and transmission of information" of Protocol V to the Convention on Certain Conventional Weapons.

(18) Furthermore, this expression reflects that the obligations to grant access to and/or share information as contained in the relevant treaties are commonly accompanied by exceptions or limitations regarding grounds for which the disclosure of information may be refused. Such grounds relate, *inter alia*, to "national defence and public security" or situations in which the disclosure would make it more likely that the environment to which such information related would be damaged.¹³⁵

(19) Paragraph 2 serves a similar purpose in the context of draft principle 18. The exception to the obligation set out under paragraph 1 concerns information vital to the national defence of a State or the security of a State or an international organization. This exception is not absolute. The second sentence of the paragraph provides that States and international organizations shall provide as much information as possible under the circumstances, through cooperation in good faith. Paragraph 2 is based on provisions contained in the Convention on the Law of the Non-navigational Uses of International Watercourses. Article 31 of the Convention provides that a watercourse State is not obliged to provide data and information vital to its national defence or security, while noting that obligation to cooperate in good faith is still applicable. The articles on prevention of transboundary harm from hazardous activities¹³⁶ and the articles on the law of transboundary aquifers¹³⁷ contain a similar exception.

(20) Draft principle 18 is closely linked to the duty to cooperate, as well as draft principle 15 on post-armed conflict environmental assessments and remedial measures.

¹³² General Assembly resolution 61/36 of 4 December 2006, annex, principle 5. The draft principles and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. (Part Two), paras. 66–67.

¹³³ General Assembly resolution 63/124 of 11 December 2008, annex, arts. 8, 13, 15, 17 and 19. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

¹³⁴ Additional Protocol I, art. 33; Geneva Convention I, art. 16; Geneva Convention II, arts. 19 and 42; Geneva Convention III, art. 23; Geneva Convention IV, art. 137.

¹³⁵ See Aarhus Convention, art. 4, para. 3 (b); Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, art. 9, para. 3 (g).

¹³⁶ Art. 14.

¹³⁷ Art. 19.